UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LEELA ABRAHAM, et al., Plaintiffs, - against - AMERICAN HOME MORTGAGE SERVICING, INC., et al., Defendants.	Case No. 12-cv-4686-WFK-JMA

SURREPLY OF DEFENDANTS
ALLY FINANCIAL INC.; AURORA LOAN SERVICES, LLC; BANK OF AMERICA, N.A., FOR ITSELF AND AS SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP; BAYVIEW LOAN SERVICING, LLC; BB&T CORPORATION; BRANCH BANKING AND TRUST COMPANY; CARRINGTON MORTGAGE SERVICES, LLC; CENLAR FSB; CITIMORTGAGE, INC.; COUNTRYWIDE HOME LOANS, INC.; EVERBANK SUCCESSOR BY MERGER TO EVERHOME MORTGAGE COMPANY; FLAGSTAR BANCORP, INC.; FNF SERVICING, INC. F/K/A LOANCARE SERVICING CENTER, INC.; GREEN TREE SERVICING LLC; HOMEWARD RESIDENTIAL, INC., F/K/A AMERICAN HOME MORTGAGE SERVICING, INC.; HSBC MORTGAGE SERVICES INC.; JPMORGAN CHASE BANK, N.A.; LITTON LOAN SERVICING LP; M&T BANK; MERRILL LYNCH & CO., INC.; MERSCORP, INC. N/K/A MERSCORP HOLDINGS, INC.; NATIONSTAR MORTGAGE, LLC; OCWEN FINANCIAL CORPORATION; PHH MORTGAGE CORPORATION; PNC BANK, NATIONAL ASSOCIATION; REGIONS BANK; SAXON MORTGAGE, INC.; SELECT PORTFOLIO SERVICING, INC.; SETERUS, INC.; SOVEREIGN BANK, N.A.; SPECIALIZED LOAN SERVICING, LLC; SUNTRUST MORTGAGE, INC.; U.S. BANK NATIONAL ASSOCIATION; VERICREST FINANCIAL, INC.; WELLS FARGO BANK, N.A.; AND WELLS FARGO BANK, N.A. D/B/A AMERICA'S SERVICING COMPANY
IN SUPPORT OF THEIR
MOTION TO SEVER AND DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

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Plaintiffs' Supplemental Memorandum of Law presents arguments that are belated, waived, redundant, and wrong as a matter of law.

At oral argument on Defendants' Motion to Dismiss, the Court authorized supplemental pleadings to address open issues or the Court's inquiries during argument (DE-274-1, at 5, l. 24 – 6, l. 1). The parties filed those pleadings on February 15, 2013 (DE-269 – DE-274). Because Plaintiffs' Supplemental Memorandum presented new arguments not raised in earlier pleadings or at oral argument, on February 28, 2013, the Court granted Defendants this opportunity to reply.

Plaintiffs' Supplemental Memorandum says nothing about the open issue that concerned the Court: the continued exercise of jurisdiction over the first named plaintiff upon dismissal of the other 362 misjoined plaintiffs. Instead, Plaintiffs interject old and irrelevant news reports (the February 2012 Attorneys General settlements with five financial institutions), misstate Defendants' position, and launch a series of new arguments that were not raised in opposition to the Motion to Dismiss or at oral argument – and that add nothing to the issues at hand.

This Court should (a) grant Defendants' Rule 20(a) Motion to Sever and Dismiss all Plaintiffs except Leela Abraham without prejudice, and (b) grant Defendants' Rule 12(b)(6) Motion to Dismiss Ms. Abraham's claims with prejudice. If the Court concludes that Plaintiffs' claims are properly joined, then all Plaintiffs' claims should be dismissed with prejudice under Rule 12(b)(6).

I. PLAINTIFFS' PRELIMINARY MATTERS

The Attorneys General Settlements. Plaintiffs open the Supplemental Memorandum by repeating the same rhetoric about a year-old event – the February 2012 Attorney General settlements involving a handful of financial institutions – that they used to open their oral

argument (Supp. Mem. at 1-2). Repetition does not create relevancy. Those settlements have no relation or connection to the issue presented: whether this action is misjoined.

Defendants' Central Contention. Defendants do not contend that this Court "is **not** the proper forum" (Supp. Mem. at 2; emphasis original). Defendants have stated that, by enacting CAFA, Congress designated this Court as a proper forum for deciding whether a purported mass action was properly joined. As Defendants' Reply in Support of the Motion to Dismiss stated: "Congress enacted Section 1332(d)(11)(B)(i) to place the Rule 20(a) decision before the federal courts" (Reply at 3).

II. PLAINTIFFS' CLAIMS DO NOT SATISFY RULE 20(a)

Plaintiffs' Supplemental Memorandum hinges on a new argument that Defendants' "membership in and use of MERS provide common questions of law and fact required by Federal Rule of Civil Procedure 20" (Supp. Mem. at 2). To begin with, Plaintiffs' Opposition and oral argument did not raise this argument, and it has been waived. *See McPhee v. General Elec. Int'l, Inc.*, 736 F. Supp. 2d 676, 681 (S.D.N.Y. 2010) ("Because Plaintiff waited to raise this argument until the Court had reviewed the submissions on the motion to dismiss and authorized discovery and supplemental briefing on one specific narrow question, the argument has been waived"), *aff'd*, 426 Fed. Appx. 33 (2d Cir. 2011); *NML Capital, Ltd. v. Republic of Argentina*, 2009 WL 1528535 (S.D.N.Y. May 29, 2009) ("the Republic waived this argument by failing to raise it in opposition to plaintiffs' motion"), *question certified and answered*, 17 N.Y.3d 250, *aff'd in part*, 435 Fed. Appx. 41 (2d Cir. 2011); *see generally Fisher v. Kansas*, 487 F. Supp. 2d 270, 278 (E.D.N.Y. 2007), *aff'd*, 288 Fed. Appx. 721 (2d Cir. 2008); *Goldberg v. UBS AG*, 690 F. Supp. 2d 92, 98-99 (E.D.N.Y. 2010).

In any event, the argument fails as a matter of law for three independent reasons.

A. Plaintiffs' Claims Do Not Arise From The "Same Transaction Or Occurrence, Or Series Of Transactions Or Occurrences

Defendants' Motion to Dismiss demonstrated that, as other district courts have consistently held, Plaintiffs' claims cannot clear Rule 20(a)'s first hurdle: they do not arise from the "same transaction or occurrence, or series of transactions or occurrences" (Moving Memo at 6-10; Reply at 8-9). Plaintiffs' Supplemental Memorandum, like its Opposition to the Motion to Dismiss and oral argument, ignores – and thus concedes – this basis for dismissal.

B. Plaintiffs' Claims Are Not Based On "Common Questions Of Law And Fact"

Plaintiffs belatedly suggest that their conclusory allegation that "all of the Defendants acted together as part of an 'ENTERPRISE' which used MERS to facilitate their fraudulent practices" creates a "common question of law and fact" sufficient to clear the second hurdle of Rule 20(a) because "each Defendant is subject to joint and several liability for membership in this scheme" (Supp. Mem. 3-4).

This argument fails for five reasons. First, courts have repeatedly rejected the notion that use of the MERS system causes injury to homeowners (*see* Moving Memo at 32-33). Second, Plaintiffs' reliance on the "common contention" analysis of *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), refutes their position. Third, Plaintiffs' premise for "commonality" is wrong as a matter of law. Fourth, Plaintiffs entirely disregard hornbook principles of agency and joint and several liability – and neither the Second Amended Complaint nor the Supplemental Memorandum proffers any facts to support the conclusory allegation of joint and several liability. Fifth, this argument, like the Second Amended Complaint, impermissibly lumps the "holding company" Defendants together with their lending and servicing subsidiaries, and wrongfully states that all Defendants are members of MERS; for example, Ally Financial Inc. and Ocwen Financial Corporation are not members of MERS (*see* DE-233 at ¶ 12; DE-281 at 2).

The Second Amended Complaint also fails to identify which of Plaintiffs' loans, if any, are registered on the MERS system.

(1) <u>No Decision Has Held That Using The MERS System Is Unlawful</u>

Every court that has considered challenges to the use of the MERS system has dismissed the claims, holding that the MERS system does not injure homeowners. *See, e.g., Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1042 (9th Cir. 2011) (affirming dismissal without leave to amend of claim for conspiracy to commit fraud through MERS: "plaintiffs have failed to show that the designation of MERS as a beneficiary caused them any injury by, for example, affecting the terms of their loans, their ability to repay the loans, or their obligations as borrowers"); *In re Mortg. Elec. Registration Sys. (MERS) Litig.*, 744 F. Supp. 2d 1018, 1029 (D. Ariz. 2010) (rejecting the premise that lenders conspired through using MERS: "The MERS system is not fraudulent, and MERS has not committed any fraud."); *Pennsylvania Pub. Sch. Emps. Ret. Sys. v. Bank of Am. Corp.*, 874 F. Supp. 2d 341, 362 (S.D.N.Y. 2012); *Huelbig v. Aurora Loan Servs., LLC*, 2011 WL 4348281, at *10 (S.D.N.Y. May 18, 2011); *Suss v. JP Morgan Chase Bank, N.A.*, 2010 WL 2733097, at *5 (D. Md. July 9, 2010) ("courts that have considered the issue have found that the [MERS] system of recordation is proper and assignments made through that system are valid").

Plaintiffs represent, with abject falsity, that *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wash. 2d 83 (2012), "found that the MERS system has injured homeowners" (Supp. Mem. 3). Instead, the Supreme Court of Washington concluded that "it is unclear whether the plaintiffs

can show any injury, and a categorical statement one way or another seems inappropriate." 175 Wash. 2d at 119.[1/]

(2) <u>There Is No "Common Contention"</u>

Plaintiffs argue that "[a]ll of Plaintiffs [sic] claims arise out of a 'common contention' that the injuries suffered by Plaintiffs arose out of Defendants' misuse of the MERS system" as "part of an ENTERPRISE" (Supp. Mem. at 2-4). They urge this Court to apply the "common contention" requirement for class actions described by the U.S. Supreme Court in *Wal-Mart Stores, Inc., v. Dukes*, 131 S. Ct. 2541 (2011).

Dukes is indeed instructive, because it rejects Plaintiffs' theory. The Supreme Court found that the "common questions" language of Fed. R. Civ. P. 23(a)(2), which parallels the "common questions" language of Fed. R. Civ. P. 20(a), "is easy to misread," because: "Any competently crafted class complaint literally raises "common questions"…. For example: Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? *Reciting these questions "is not sufficient to obtain class certification….*" *Id.* at 2565 (emphasis added; citations and footnote omitted).

[1/] *Bain* did not even consider whether a lender's use of the MERS system could cause harm to homeowners. The issue there was whether MERS could be liable for holding itself out as the beneficiary on a deed of trust without possessing the promissory note when a Washington statute required beneficiaries to possess a note in order to proceed with foreclosure. 175 Wash. 2d at 89, 91. The Washington Supreme Court held that, although MERS potentially could be liable, each plaintiff would have to show how this conduct caused her injury: "Given the procedural posture of these cases, it is unclear whether the plaintiffs can show any injury, and a categorical statement one way or another seems inappropriate. Depending on the facts of a particular case, a borrower may or may not be injured by the disposition of the note, the servicing contract, or many other things, and MERS may or may not have a causal role." *Id.* at 119.

Instead, the Supreme Court required allegation of a "common contention … capable of classwide resolution … in one stroke":

> *Their claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution* – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.
>
> What matters to class certification ... is not the raising of common 'questions' – even in droves – but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers….

Dukes, 131 S. Ct. at 2551 (emphasis added; citations and footnote omitted).

Plaintiffs' exegesis of the creation, purpose, and activities of MERS fails to explain how their "ENTERPRISE" allegation could possibly generate the "common answers" demanded by *Duke*. The "common issue" put forward by Plaintiffs' Supplemental Memorandum – that Plaintiffs were "similarly injured" by Defendants' use of MERS (Supp. Mem. 6) – fails on even a cursory inspection. Plaintiffs are not "similarly injured" if, as Plaintiffs contend, some "spent countless hours trying to determine who is the actual owner of their notes"; some "wish to resolve disputes regarding their loan"; some want to "take advantage of mortgage refinancing"; some need to "defend foreclosure proceedings"; some "refinance[d] a home"; and some have lenders who "fail[ed] to comply fully with the dictates of the Truth-in-Lending Act" (Supp. Mem. 6). Whether or not these matters involve MERS, the issues are diverse, Plaintiff-specific, and transaction-specific. They are not issues common to each and every member of the mass, as Rule 20(a) requires.[2/]

[2/] *Dukes* reversed class certification because plaintiffs located in different retail stores with different work histories and different interactions with the same employer could not allege a common contention of gender discrimination that could be resolved in a single action. Here, 363 Plaintiffs from different

(3) <u>Plaintiffs' Premise For Commonality Is Wrong As A Matter Of Law</u>

Plaintiffs' premise for commonality – that MERS "makes it overtly [sic] burdensome, if not impossible, for any homeowner to learn the identity of the entity or individual having a security interest in his or her property" (Supp. Mem. at 5) – is contradicted by federal precedent and statute. The Ninth Circuit rejected this argument squarely in *Cervantes*, holding: "Although the plaintiffs allege that they were 'deprived of the right to attempt to modify their toxic loans, as the true identity of the actual beneficial owner was intentionally hidden' from them, they do not support this bare assertion with any explanation as to how the operation of the MERS system actually stymied their efforts to identify and contact the relevant party to modify their loans." 656 F.3d at 1042.

More important, the Truth in Lending Act requires loan servicers, at the borrower's request, to identify the name, address, and telephone number of the owner or the master servicer of the obligation, 15 U.S.C. § 1641(f)(2); and, beginning in 2009, requires the new owner or assignee of a mortgage loan to notify the borrower in writing within 30 days of the purchase or assignment of the assignee's identity, address, and phone number (among other things). 15 U.S.C. § 1641(g)(1).

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geographic locations with different loan histories and different interactions with not one, but 38 different defendants do not and cannot allege a common contention that can be resolved in a single action. Even if Plaintiffs could prove that Defendants individually or collectively used the MERS system to cause them harm, this would not render Plaintiffs' individual claims, which range from misrepresentation and fraudulent concealment to slander of title and unjust enrichment by each of Plaintiffs' lenders, any more similar or capable of resolution in one stroke.

(4) There Is No Basis For Joint and Several Liability

Plaintiffs claim that all 38 Defendants are somehow "jointly and severally liable" for each other's actions based on (a) the "underlying wrong" of "the use of the MERS system to injure the Plaintiffs" and (b) "under an agency theory" (Supp. Mem. at 3, 7).

These conclusory contentions lack the support of any factual allegations. Plaintiffs did not adequately plead their claim for civil conspiracy ("Concert of Action/Member Liability") (*see* Moving Memo at 31-34; Reply at 19). Plaintiffs do not allege and cannot explain how 38 Defendants could be jointly and severally liable to each Plaintiff merely because they allegedly engaged in the same conduct. Courts in the Second Circuit "have repeatedly held that joinder is improper where the plaintiff does no more than assert that the defendants merely committed the same type of violation in the same way." *Twine v. Four Unknown New York Police Officers*, 2012 WL 6184014, at *9 (S.D.N.Y. Dec. 12, 2012) (citation and quotations omitted); *see Nassau Cnty. Ass'n of Ins. Agents, Inc. v. Aetna Life & Cas. Co.*, 497 F.2d 1151, 1154 (2d Cir. 1974) (misjoined complaint was a "gross abuse of procedure" when plaintiffs brought claims against multiple defendants for terminating or threatening to terminate contracts, when the actions "were separate and unrelated" and occurred "at different times for different reasons with regard to different [plaintiffs]"); *Kenvin v. Newburger, Loeb & Co.*, 37 F.R.D. 473, 475 (S.D.N.Y. 1965); *Deskovic v. City of Peekskill*, 673 F. Supp. 2d 154, 167-68 (S.D.N.Y. 2009) (citing cases); *see also Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674 (6th Cir. 1988) (unrelated bank defendants improperly joined when plaintiff's dealings with each defendant involved different loan terms, despite the allegation that each bank had committed the identical fraud).

Plaintiffs' theory also stands the law of agency on its head. They fail to show how any given Plaintiff's loan transaction with any given Defendant could give rise to liability on the part

of another Defendant with whom he or she never transacted business. The mere allegation that MERS acted as agent for both Defendants is insufficient. Taking Plaintiffs' argument to its logical conclusion, one principal could bind another, unrelated principal to its wrongful acts simply because they happened to use the same agent. That is not the law – and if it were, the business world would grind to a halt.

This errant argument also underscores the lack of commonality among Plaintiffs' claims. The Second Amended Complaint is based on a myriad of unrelated transactions that demand a Plaintiff- and Defendant-specific analysis of the supposed wrongdoing to determine the basis and extent, if any, of the liability of any given Defendant to any given Plaintiff – and the specific role, if any, of MERS in that supposed wrongdoing.

C. Joinder Would Deny Fundamental Fairness And Due Process

Plaintiffs' Supplemental Memorandum, like its Opposition and oral argument, also ignores, and thus concedes, Defendants' showing that joinder would not "comport with the principles of fundamental fairness," cause prejudice, and "confuse and complicate the issues…." (Moving Memo at 10-11; Reply at 9, quoting *Next Phase Distribution, Inc. v. John Does 1-27*, 284 F.R.D. 165, 168 (S.D.N.Y. 2012) (citations omitted)).

III. PLAINTIFFS' RULE 12(b)(6) ARGUMENTS FAIL AS A MATTER OF LAW

Plaintiffs' Supplemental Memorandum briefly attempts to resuscitate their fraudulent concealment and unjust enrichment claims by introducing new arguments not presented in their Opposition to the Motion to Dismiss or at oral argument. Those arguments are not only waived, but also have no merit.

A. <u>Plaintiffs Cannot State A Claim For Fraudulent Concealment</u>

Plaintiffs did not state their fraudulent concealment claim with requisite specificity and can plead neither a duty to disclose nor causation (Moving Memo at 14-24; Reply at 10-14). Ignoring these fatal flaws, Plaintiffs argue for the first time that this claim is well-stated because "the MERS ENTERPRISE effectively concealed information from Plaintiffs which would have allowed them to fulfill their responsibilities fixed by the doctrine of caveat emptor" (Supp. Mem. at 12).

"[T]he doctrine of caveat emptor requires that a buyer act prudently to assess the fitness and value of his purchase." *Ballow Brasted O'Brien & Rusin P.C. v. Logan*, 435 F.3d 235, 239 (2d Cir. 2006) (quotations and citation omitted). Presumably, Plaintiffs' "responsibilities fixed by the doctrine of caveat emptor" were their obligation to assess the suitability of their loans. Even if, as Plaintiffs allege, Defendants did not disclose their intent to sell Plaintiffs' mortgages on the secondary market and not record these sales in county records (Supp. Mem. at 5), these non-disclosures would be unrelated to the terms of Plaintiffs' loans and had no impact on Plaintiffs' ability to determine whether their loans were suitable. S*ee Cervantes v. Countrywide Home Loans, Inc.*, 2009 WL 3157160, at *11 (D. Ariz. Sept. 24, 2009) ("[a]ny lack of notice in the public records" resulting from the use of MERS "does not alter Plaintiffs' obligations under the mortgages"), *aff'd*, 656 F.3d 1034 (9th Cir. 2011); *Fontenot v. Wells Fargo Bank, N.A.,* 198 Cal. App. 4th 256, 272 (Cal. App. 1st Dist. 2011) ("Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor. As to plaintiff, an assignment merely substituted one creditor for another, without changing her obligations under the note").

B. Plaintiffs Cannot State A Claim For Unjust Enrichment

To assert unjust enrichment, "one party [must] possess[ ] money that in equity or good conscience they should not have obtained or possessed *because it rightfully belongs to another*." *Eastman Kodak Co. v. Asia Optical Co.*, 2012 WL 2148198, at *7 (E.D.N.Y. June 13, 2012) (emphasis in original, quotations and citation omitted). If a contract – *i.e.*, a mortgage note – governs a particular subject, a quasi-contract claim is precluded. *See McAnaney v. Astoria Fin. Corp.*, 665 F. Supp. 2d 132, 175 (E.D.N.Y. 2009). ("The theory of unjust enrichment … is an obligation the law creates *in the absence of any agreement*") (emphasis in original; quotations and citation omitted).

Plaintiffs previously based this claim on Defendants' receipt of TARP funds (Opp. at 19). Now, for the first time, Plaintiffs point to Paragraph 451 of the Second Amended Complaint as the basis of their unjust enrichment claim (Supp. Mem. at 12).

Paragraph 451 alleges that Plaintiffs lost equity in their property and suffered lower credit ratings, but lost equity and damaged credit ratings are not money or property in Defendants' possession. Plaintiffs cannot base an unjust enrichment claim on the allegation that "Defendants took from Plaintiffs and other borrowers billions of dollars in interest payments and fees" (SAC ¶ 451), because those interest payments and fees are the subject of contracts. Finally, the allegation that Defendants "generated billions of dollars in profits by selling [Plaintiffs'] loans at inflated values, and betting against the Plaintiff home owners through the Defendants' investments in credit default swaps and other financial instruments" is also meaningless. Plaintiffs cannot predicate an unjust enrichment claim on profits Defendants realized by selling their own property (*i.e.*, Plaintiffs' mortgages) or making investment decisions. *See Boccardi Capital Sys. v. D.E. Shaw Laminar Portfolios, L.L.C.*, 2009 WL 362118, at *8 (S.D.N.Y. Feb. 9)

(plaintiffs cannot base an unjust enrichment claim on profits from the sale of stock that they did not own), *aff'd,* 355 Fed. Appx. 516 (2d Cir. 2009).

CONCLUSION

For these reasons and for the reasons set forth in Defendants' Moving Memorandum of Law and Reply Memorandum of Law, at oral argument, and in Defendants' Supplemental Submission dated February 15, 2013, this Court should (a) grant Defendants' Rule 20(a) Motion to Sever and Dismiss all Plaintiffs except Leela Abraham, without prejudice to the other Plaintiffs' ability to file new individual actions in any court with jurisdiction; and (b) grant Defendants' Rule 12(b)(6) Motion to Dismiss Ms. Abraham's claims with prejudice. If the Court holds that Plaintiffs' claims are properly joined, then all Plaintiffs' claims should be dismissed with prejudice under Rule 12(b)(6).

Dated: March 15, 2013
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